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# Sex Discrimination in the Workplace Across the Atlantic: A Comparison of Burdens of Proof in the United States and the United Kingdom

Jason E. Ruff*

## I. Introduction

Litigation concerning sex discrimination in the workplace makes up an ever-expanding amount of work for lawyers and courts in the United States.[1] Recent changes to sex discrimination law in the United Kingdom (U.K.) in the form of plaintiff-friendly regulations enacted in 2001[2] have set off alarm bells for employers in that country as well. Due to the heightened risk of litigation, this is an area of law where employers must tread carefully. Because defendants in both countries bear a significant burden in rebutting plaintiffs' claims, being unaware of the nuances of that burden can lead to a plaintiff's verdict. This would especially be so should the plaintiff-friendly standards evolving in Europe cross the Atlantic.

This Comment focuses on the burdens of production and persuasion that parties have in certain types of sex-based employment discrimination claims in the U.S. and the U.K., and analyzes recent changes in the law. The trend, first in continental Europe with European

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1. Approximately 25,000 complaints alleging discrimination on the basis of sex under Title VII have been filed with the Equal Employment Opportunity Commission each year from 1993 through 2004. EEOC Sex-Based Charges Statistics, http://eeoc.gov/stats/sex.html. In the 1990s, the number of employment discrimination cases sharply increased, with the number of filings in the U.S. District Courts nearly tripling between 1990 and 1998, from 8,143 to 23,735. Press Release, U.S. Dep't of Justice Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/pub/press/crcusdc.pr. The growth largely was driven by cases between private parties, which rose from nearly 7,000 cases to more than 21,000 in 1998. *Id.*

2. Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, S.I. 2001/2660.

Union directives and later in the U.K. with the 2001 Regulations, is toward more plaintiff-friendly standards in employment litigation. Although the trend is not as pronounced in the U.S., it arguably exists.

Part II of the Comment looks at the statutory bases for discrimination laws in the U.S. and the U.K., beginning with the Equal Pay Acts in both countries and then focusing on the primary sex discrimination legislation, Title VII of the Civil Rights Act of 1964 in the U.S. and the Sex Discrimination Act in the U.K. Part III focuses on how courts in the U.S. and the U.K. have implemented their respective Equal Pay Acts. Part IV takes a detailed look at Title VII and the Sex Discrimination Act, particularly the employers' burdens of proof under each statute that must be satisfied to avoid judgment for the plaintiff. The requirement in the U.S. that plaintiffs bear the ultimate burden of persuasion in Title VII disparate treatment cases and the 2001 Regulations in the U.K. codifying the common law trend towards increasing employers' burden are contrasted because they best demonstrate how differences in the U.S. and U.K. burdens of production and persuasion result in a relatively employer-friendly system in the U.S. and a more employee-friendly one in the U.K.

## II. Statutory Bases for Laws Against Employment Discrimination Based on Sex

### *A. Development in the U.S.*

Prior to the enactment of legislation prohibiting sex discrimination in the employment context, courts in the U.S. and the U.K. were often hostile to the rights of women in the workplace. In the U.S., this was epitomized by the Supreme Court's decision in *Muller v. Oregon*,[3] where the Court held that although the 14th Amendment to the U.S. Constitution protects men's unlimited freedom to contract with employers, it does not provide the same protection for women. Basing its decision on "abundant testimony of the medical fraternity," the Court reasoned that because of women's "special physical organization" leading to their "disadvantage in the struggle for subsistence," long hours of labor are dangerous for women as individuals.[4] Further, because of the importance of women to "the rearing and education of children[,] the maintenance of the home" and their "maternal functions[,]" the Court felt that restrictions on women's freedom of contracting is "not solely imposed for her benefit, but also largely for the benefit of all," for the

3. 208 U.S. 412 (1908).
4. *Id.* at 421.

public has an interest in preserving the "strength and vigor of the race" by limiting how long women can work.[5] Therefore, the Court concluded that Oregon's law limiting women's work hours was constitutional.[6]

Against such a backdrop, and as attitudes towards women in the workplace evolved, U.S. legislation addressing employment discrimination based on sex originated in the 1960s. The U.S. Equal Pay Act was passed in 1963,[7] soon followed by the ground-breaking Title VII of the Civil Rights Act of 1964 (Title VII).[8] Title VII was originally designed to combat discrimination in employment on the basis of race and was not originally contemplated to be aimed intentionally at sex discrimination.[9] In fact, the language concerning sex discrimination was inserted by lawmakers opposed to civil rights legislation in an attempt to defeat the bill by making it less palatable to their colleagues, but the drafters failed in their goal.[10] Despite the convoluted and controversial legislative history, Title VII now covers employment discrimination based not only on sex and race but based also on color, religion, and national origin.[11]

*B. Development in the U.K.*

Much of the current U.K. statutory language concerning employment discrimination based on sex was inspired by Title VII in the U.S.[12] Thus, the growth of U.K. sex discrimination legislation has

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5. *Id.* at 421-22.

6. *Id.* at 423.

7. "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]" 29 U.S.C. § 206(d)(1) (2006). The Equal Pay Act is currently incorporated into the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2005), the basic U.S. statutory scheme regulating wages and hours at the federal level.

8. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

9. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989) (citing C. & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT 115-17 (1985)) (observing the "bizarre path by which 'sex' came to be included as a forbidden criterion for employment" under Title VII).

10. *Price Waterhouse*, 490 U.S. at 243 n.9.

11. 42 U.S.C. § 2000e-2(a) (2006).

12. *See, e.g.*, Mary Redmond, *Women and Minorities*, in LABOUR LAW IN BRITAIN 476 (Roy Lewis ed., 1986). Additionally, because of the closely related statutory bases for sex and race discrimination in the U.S. and the U.K., sex and race cases are used interchangeably by the courts of both countries to illustrate and support the larger principles of anti-discrimination laws generally. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (clarifying that principles articulated by the Supreme Court, and legislators' statements in Title VII's legislative history, referring to one type of employment discrimination apply with "equal force" to other types); *see also* Ashley Norman, *Sex, lies and employment tribunals . . .*, NEW LAW JOURNAL, April 5, 2002

paralleled that in the U.S.[13] Prior to action by Parliament, British courts had not developed common-law prohibitions against gender discrimination, and as in the U.S., case law was often hostile to women's rights.[14] Also similar to the U.S., principles and statutory language in U.K. legislation addressing sex discrimination mirrors that for race discrimination.[15] In many cases the legislation evolved into its current form as European law and directives were instituted in the U.K.[16] Today the two major pieces of U.K. legislation addressing sex-based employment discrimination are the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975. British courts have long regarded these two acts together as creating a single statutory scheme prohibiting discrimination based on sex.[17]

The U.K. Equal Pay Act was originally enacted in 1970, providing equal pay for equal work.[18] However, much of the Act did not come into

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(discussing developments in U.K. civil rights law and noting that "[o]ne of the most important sex discrimination cases in recent months is not a sex discrimination case at all. This important race case has broad applications across discrimination law generally."). Therefore, even though the focus of this comment is on gender discrimination, cases involving race discrimination are relevant and also discussed.

13. *See* Redmond, *supra* note 12.

14. *See, e.g.*, Roberts v. Hopwood, [1925] A.C. 578 (H.L.), holding it to be unlawful for local governments to provide for equal pay for both men and women.

15. Unlike Title VII in the U.S. which includes prohibitions against discrimination based both on sex and race within the same statutory scheme, the comparable legislation in the U.K. separates the two into the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA). However, the SDA and the RRA are very similar and the language is largely identical in crucial areas. *Compare* SDA § 1(1) ("A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if on the grounds of her sex he treats her less favourably than he treats or would treat a man[.]") *with* RRA § 1(1) ("A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if on racial grounds he treats that other less favourably than he treats or would treat other persons; or he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other[.]"). In fact, the SDA was used as a model for the RRA. *See, e.g.*, Bob Hepple & Sandra Freeman, *Discrimination*, in INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS ¶¶ 332-33 (R. Blampain ed., 1992).

16. The European Communities Act 1972, c. 68, requires European Community law to be adopted in the U.K. For a discussion of the interrelation of European and U.K. law concerning sex discrimination and the obligation of the U.K. to ensure its laws are consistent with those of the European Community, *see* Lord Denning's opinion in Shields v. E. Coomes (Holdings) Ltd., [1978] W.L.R. 1408.

17. Redmond, *supra* note 11, at 479. *See also* Steel v. Union of Post Office Workers, [1977] W.L.R. 64 ("[I]t is necessary as far as possible to construe the 1975 [Sex Discrimination] Act with the 1970 [Equal Pay] Act so as to form a harmonious code."); Shields v. E. Coomes (Holdings) Ltd., [1979] W.L.R. 1408 (Lord Denning) (noting that European Community law concerning sex discrimination, the Equal Pay Act, and the SDA "must all be taken together[,]" but acknowledging that "the task of construing them is like fitting together a jig-saw puzzle. The pieces are all jumbled together[.]").

18. The Long Title of the Act explains its purpose: "[T]o prevent discrimination, as

force until the 1975 implementation of Article 119 (now Article 141) of the Treaty of Rome and the European Equal Pay Directive, both of which are major European Community equal rights legislation with which all member states must comply.[19] A major revision to the Act occurred in 1983, when it was broadened to include equal pay protections for women doing work of "equal value" to men, even if the actual job title differs.[20]

The U.K. Sex Discrimination Act (SDA) was originally enacted in 1975, but it did not come into force until the U.K. implemented the European Equal Treatment Directive in 1976.[21] In 2001, the SDA changed significantly when the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations (2001 Regulations) were enacted.[22] The 2001 Regulations implemented the European Union's Burden of Proof Directive,[23] and had two components: they articulated higher burden for an employer defending itself against sex discrimination claims, and they changed the definition of indirect discrimination.[24] Both pose potential problems for employers and are discussed in detail below.

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regards terms and conditions of employment between men and women." Equal Pay Act 1970.

19. E.C. Directive 75/117 (1975).

20. Equal Pay Act (Amendment) Regulations 1983, S.I. 1983/1794. This amendment and the "equal value" concept arose as a result of efforts by the Commission of the European Communities to compel the U.K. to fully implement the Treaty of Rome, which included such protections. *See* Comm'n of the European Cmtys. v. United Kingdom, [1982] I.C.R. 578. This is another area where plaintiffs in the U.K. have an easier time alleging sex discrimination compared to those in the U.S., where the similar "comparable worth" theory is rarely recognized. This theory permits plaintiffs to claim "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community[,]" County of Washington v. Gunther, 452 U.S. 161, 166 (1981), even if the jobs being compared are dissimilar, for example, comparing the pay of a secretarial job held by a woman and a janitorial job held by a man. Unfortunately for U.S. plaintiffs, this theory is not recognized under the Equal Pay Act and only rarely is recognized under Title VII. *See generally* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 579-82 (6th ed. 2003).

21. E.C. Directive 76/207 (1976).

22. S.I. 2001/2660.

23. E.C. Directive 97/80 (1997) (establishing the standard within the European Community that once an employee presents "facts from which it may be presumed that there has been direct or indirect [sex] discrimination, it shall be for the [employer] to prove that there has been no breach of the principle of equal treatment").

24. S.I. 2001/2660.

## III. Equal Pay Acts

### *A. Establishing a Prima Facie Case under the Equal Pay Acts*

The Equal Pay Acts in both the U.S. and the U.K. predate Title VII and the SDA in their respective countries.[25] Under the U.S. Equal Pay Act, an individual plaintiff must show that her or his employer pays different rates of pay to employees of the opposite sex for performing jobs that are substantially equal.[26] Similarly, the U.K. Equal Pay Act covers doing the same or "broadly similar" work as men,[27] or work that has been "rated as equivalent with that of [men]."[28] A prima facie case is established by a gender-based comparison showing that a woman who does such "like work" as a man is paid or treated less favorably than the man.[29] This variation is presumed to be due to the difference of sex, and creates a rebuttable presumption for the employer to counter.[30] As will be explored, after the plaintiff successfully articulates a prima facie case, both Equal Pay Acts shift the burden to the employer by requiring the employer to assert affirmative defenses.

### *B. Employer Defense Burdens under the Equal Pay Acts*

#### 1. U.S. Employer Defenses.

Once a plaintiff makes out her prima facie case in a U.S. Equal Pay Act claim, the defendant's burden is fairly straightforward: to escape liability, the employer must show one of the four specific statutorily defined affirmative defenses.[31] The statutory defenses were illustrated

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25. *See infra* Part II.

26. *See, e.g.,* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). The *Corning Glass* Court noted that "[a]lthough the Act is silent on this point, its legislative history makes plain that the [plaintiff] has the burden of proof on this issue." *Id.*

27. Equal Pay Act § 1(4).

28. Equal Pay Act § 1(5). This is actually a formal evaluation that can be undertaken to rate the "worth" of the work a woman is doing compared do what a man is doing even though the actual job title, description, and primary tasks may not be identical. The Act stipulates that such things as effort, skill, and decision making are to be compared in the evaluation, and if they are found to be equivalent, the woman should receive the same pay as the man in the same "undertaking." *Id.*

29. Nelson v. Carillion Services Ltd., [2003] I.C.R. 1256.

30. *Id.*

31. Under the U.S. Equal Pay Act, an employer may pay different rates for equal or similar work:

> where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation

by the Supreme Court in *Corning Glass Works v. Brennan*,[32] where a group of female day shift inspectors was being paid a lower base wage than male inspectors doing the same work on the night shift.[33] The Secretary of Labor argued that under the Equal Pay Act, although higher wages may be paid for night shift work without violating the Act, such a pay differential must be based on a factor "other than sex."[34] Here, the Secretary argued, the employer failed to carry its burden of proof by showing that the higher base wage for male night inspectors was, in fact, based on any factor other than sex.[35] Although the Court noted that the pay differential arose before the Equal Pay Act came into force and characterized the employer's actions as "understandable as a matter of economics" because of a job market where men would not work at a lower wage, the Court agreed with the Secretary and held that the pay difference nevertheless became illegal once the Equal Pay Act was born.[36] The Court reasoned that the employer was taking advantage of

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> of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wages of any employee.

29 U.S.C. § 206(d)(1) (2006). These statutory justifications for pay differences based on sex were originally not available under Title VII. An employer could therefore be in compliance with the Equal Pay Act but still run the risk of violating Title VII if a pay difference was a result of one of the above four factors. Congress reconciled the Equal Pay Act defenses with Title VII with the addition of § 703(h) to Title VII. The so-called Bennett Amendment harmonized the two statutory schemes by stating that an employer does not violate Title VII if wage differentials based on sex are "authorized" by the Equal Pay Act (that is, the difference is a result of one of the four reasons permitted by Equal Pay Act). 42 U.S.C. § 2000e-2(h) (2006).

32. 417 U.S. 188 (1974).

33. *Id.* at 190. Certiorari in *Corning Glass* was granted under interesting circumstances. The Court consolidated two cases with basically identical facts, *see infra* note 31, and involving the same employer, but at different work locations less than forty miles apart in different states. *Id.* at 190-91. In a New York case, the Second Circuit held that the wage difference violated the Equal Pay Act. *See* Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973). However, in a Pennsylvania case, the Third Circuit found no violation. *See* Brennan v. Corning Glass Works, 480 F.2d 1254 (3d Cir. 1973). The Court granted certiorari to resolve this "unusually direct" conflict between the circuits. *Corning Glass*, 417 U.S. at 191. The Court ultimately agreed with the Second Circuit and reversed the Third. *Id.* The wage difference developed because of pre-Equal Pay Act state laws prohibiting women from working at night. *Id.* at 191. When the plant began a night shift, the employer therefore had to recruit men to do same work at night that the women were doing during the day. *Id.* The male employees who transferred to the night shift "demanded and received" higher wages than the women doing the same work during the day. *Id.*

34. *Id.* at 197.

35. *Id.* The Court found evidence in the record that the employer felt additional compensation was warranted because the men viewed inspection jobs as demeaning and as "women's work." *Id.* at 192 n.3.

36. *Id.* at 205. The Court quoted the Second Circuit, noting that the Equal Pay Act was enacted in part as a recognition of "the weaker bargaining position of many women" and the belief that "discrimination in wage rates represented unfair employer exploitation of this cheap source of labor." *Id.* at 206.

the availability of female labor, and the difference in wage rates arose only because of the sex of the workers.[37]

Despite the broadly worded "any factor other than sex" defense available to employers, courts put a high burden of persuasion on employers to discharge their statutory defenses. In *Stanziale v. Jargowsky*,[38] for example, an older male working as a sanitary inspector sued when a younger female was hired for the same position and was paid more.[39] The Third Circuit articulated a high standard for the employer when it attempted to assert one of the statutory defenses. To successfully argue summary judgment, the court required the employer to submit evidence from which a reasonable factfinder could conclude "not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[40] In *Stanziale*, the employer explained the wage difference by pointing to the female's undisputed superior education and training levels.[41] However, the record lacked evidence to prove that the pay difference was so clearly attributed to the differences in education and training that no rational jury could find that the differences were due to the employees' sex.[42] Because the defendant bears the burden at trial to clearly show one of the four statutory defenses, and because here the employer did not carry that burden, the court of appeals reversed the district court's grant of summary judgment for the employer on the Equal Pay Act claim.[43]

Similarly, a court placed a heavy burden on the employer to establish one of the four Equal Pay Act defenses in *Ryduchowski v. The Port Authority of New York and New Jersey*.[44] There, a jury found that the employer failed to establish the valid merit system affirmative defense for the pay disparity between a female employee and a similarly situated male.[45] The district court concluded, however, that the employer had met its burden, and granted the employer judgment as a matter of

37. *Id.* at 208.
38. 200 F.3d 101 (3d Cir. 2000).
39. *Id.* at 104.
40. *Id.* at 107-08 (emphasis added).
41. *Id.* at 108.
42. *Id.* at 107, *quoting* E.E.O.C. v. Delaware Dep't of Health and Soc. Servs., 865 F.2d 1408, 1414 (3d Cir. 1989).
43. *Stanziale*, 200 F.3d at 108. However, summary judgment for the employer on a Title VII claim in this case was affirmed because the employee did not present sufficient evidence for a factfinder to reasonably conclude that the younger female's superior qualifications were so unrelated to her employment so as to be a pretext for intentional discrimination. *Id.* at 107.
44. 203 F.3d 135 (2d Cir. 2000).
45. *Id.* at 137.

law.[46] On appeal, the Second Circuit characterized the employer's burden in asserting the Act's affirmative defenses as "a heavy one" because statutory exemptions are "narrowly construed."[47] Considering this high burden, the ample evidence to support the verdict at trial, and the amount of deference that should be afforded juries' findings of fact generally, the court reinstated the jury verdict.[48]

2. U.K. Employer Defenses.

After a plaintiff has made out her prima facie case under the U.K. Equal Pay Act, British employers have a statutory defense under the Act, the "material factor defense."[49] Under this defense, a variation between a man's and a woman's compensation is justifiable if the employer proves first that the variation is "genuinely due to a material factor which is not the difference of sex," and second that the factor is "a material difference between the woman's case and the man's."[50]

The material factor defense was challenged in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*,[51] where an employer paid part-time workers ten percent less per hour than full-time workers performing the same work. All but one of the part-time workers was female, and one of them challenged the pay difference on Equal Pay Act grounds, contending that the Act required equal pay in every case where a woman performs "like work" to men.[52] The employer asserted the material factor defense, arguing that the difference was not based on the characteristics of the worker or the quality of the work, but rather that it was motivated by the need to discourage absenteeism, to ensure that expensive machinery was being used to its fullest extent, and to encourage greater productivity.[53] The industrial tribunal agreed, finding that the difference in work hours constituted a "material difference, other than the difference of sex," to justify the pay differential.[54]

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46. *Id.* at 141.
47. *Id.* at 143.
48. *Id.* at 145.
49. Equal Pay Act 1970, c. 41, § 1(3).
50. *Id.*
51. [1981] W.L.R. 927.
52. *Id.* at ¶ 2.
53. *Id.* at ¶ 1.
54. Although the employment appeal tribunal agreed that there was no Equal Pay Act claim here, the plaintiff appealed, and the EAT referred the question to the European Court of Justice to see if the lower part-time pay rate ran afoul of Article 119 of the EEC Treaty or of the European Community's Equal Pay Directive. The European Court of Justice clarified that a lower part-time pay rate does not necessarily amount to illegal sex discrimination, provided that the hourly rates are applied to workers belonging to either category without distinction based on sex, or unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the grounds that the group of

The House of Lords later clarified that under the material factors defense, an employer must satisfy an employment tribunal on several matters.[55] The employer must demonstrate that the explanation given for the pay disparity is genuine and not a "sham or pretence" (echoing Title VII and SDA principles discussed in Part IV, *infra*), that the reason is due to a material, significant and relevant factor, and that the reason is not "the difference of sex."[56] If the employer can discharge its burden, there is no need to prove a "good" reason for the pay disparity; the employer must only show that the disparity is not due to the difference of sex.[57] Conversely, however, the mere absence of actual sex discrimination or an historical reason for the pay disparity is not enough to discharge the burden.[58] Rather, there must be an actual reason for the disparity that is completely unrelated to sex.[59]

## IV. Title VII and the Sex Discrimination Act

Title VII in the U.S. and the SDA in the U.K. provide employment discrimination protections beyond the differences in pay that the Equal Pay Acts prohibit. They address subtler forms of discrimination and prohibit most employment decisions from being based on the sex of an employee. As will be explored, Title VII and the SDA are similar in their statutory objectives and share common threads in their judicial interpretation. However, recently the U.S. and the U.K. have been drifting apart on the issue of the parties' burdens of proof under these statutory schemes. Both Title VII and the SDA use similar concepts, although different terms, to address the impact that discriminatory acts or policies have on individuals or groups. One concept is called "disparate treatment" in the U.S. and is analogous to "direct discrimination" in the U.K.; the other is "disparate impact" in the U.S. and the roughly equivalent "indirect discrimination" in the U.K.[60]

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workers is composed mainly of women. *Id.*

55. Glasgow City Council v. Marshall, [2000] W.L.R. 333.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. The British and American terms are not completely interchangeable, as differences do exist. However, they are close enough to illustrate the themes discussed in this Comment.

### *A. Disparate Treatment and Direct Discrimination*

#### 1. The Prima Facie Case.

The prohibition of disparate treatment and direct discrimination means that employers in the U.S. cannot legally discriminate "because of . . . sex,"[61] and employers in the U.K. cannot legally treat a woman "less favourably" than a man.[62]

"Disparate treatment" is the practice of intentionally dealing with persons differently because of certain characteristics such as sex and race.[63] An indispensable element of a disparate impact case is intent: the employer must have intentionally discriminated against the employee, and the protected trait must have actually motivated the employer's decision to take the action that it did.[64] Because it is difficult to prove by direct, objective evidence that these often subjective decisions were based on sex, a plaintiff is not required to submit direct evidence of discriminatory intent.[65] Instead, a rather complex scheme has evolved

61. "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2006).

62. "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if on the grounds of her sex he treats her less favourably than he treats or would treat a man." SDA § 1(1)(a). Although much of the SDA refers specifically to "women" being treated less favorably than "men," § 2 of the SDA explicitly states that the Act is to be read "as applying equally to the treatment of men, and for that purpose shall have the effect with such modifications as are requisite." Similarly, men and whites are protected under the sex and race language of Title VII. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

63. BLACK'S LAW DICTIONARY 483 (7th ed. 1999).

64. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

65. Both British and U.S. courts recognize the challenge of showing discrimination by direct evidence. The U.S. Supreme Court recognizes that proving an employer's actual intent is often an impossible task. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983). Because eyewitness testimony to the employer's mental processes is rare, proving actual intent would be an unfair burden on the plaintiff. *Id.* However, the Court acknowledges that attempting to determine intent (through, *i.e.*, inferences) is not an undue burden to place upon a court: "The law often obliges finders of fact to inquire into a person's state of mind. . . . 'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.'" *Id.*, *citing* Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (Eng. 1885). Therefore, if it is not possible for a plaintiff to show direct evidence of discriminatory motive, it is permissible for the factfinder to infer it from the mere fact of differences in treatment. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See also* Barton v. Investec Henderson Crosthwaite Secs. Ltd., [2003] I.C.R. 1205 at ¶ 25(3)-(4) (EAT) (discussion by a British employment tribunal noting that because it is "unusual" to find direct evidence of sex discrimination, it is proper for a

for the parties to make their cases successfully in the absence of direct evidence.[66] Under this scheme, circumstantial evidence is sufficient to show the employer's intent or motivation to discriminate.[67]

In general, a plaintiff alleging an individual disparate treatment claim under Title VII based on circumstantial evidence must establish a prima facie case by showing that she is covered by the statute, there was a vacant position, she applied for that position, she was qualified, she was denied the position, and the position subsequently remained open to be filled by someone else.[68] However, these elements are not rigid, and the Supreme Court has elaborated that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."[69] However, the plaintiff must show that the employment decision was made under circumstances "which give rise to an inference of unlawful discrimination."[70] A plaintiff's burden of proof at the prima facie stage is "easily met."[71] Satisfying this burden raises an inference of discrimination and creates a presumption that the employer unlawfully discriminated against the employee, a presumption the

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tribunal to "depend on what inferences it is proper to draw from the primary facts found by the tribunal").

66. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

67. *Id.*

68. *Id.* at 802.

69. *Id.* at 802 n.13. As a later decision noted:

> The importance of McDonnell Douglas lies, not in its specification of the elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII].

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

70. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). *See also* Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175, 1191 (E.D. Pa. 1990), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992) ("A plaintiff in a sex discrimination case can establish a prima facie showing of promotion discrimination by demonstrating that she is a member of the protected class, that she was qualified for the position, that she was not promoted into a job for which she was qualified, and that the position was given to a male.").

71. *Ezold*, 751 F. Supp. at 1191. More recently, a state supreme court, applying the *McDonnell Douglas* framework to a state anti-discrimination law and focusing on the "qualified" prong of a prima facie case, held that the plaintiff satisfied his prima facie burden when he showed simply that he was performing his job prior to the termination. In *Zive v. Stanley Roberts, Inc.*, 867 A.2d 1133 (N.J. 2005), the court rejected the employer's claim that the plaintiff failed his prima facie burden because he was not "qualified for the position" since he had failed to meet sales targets and so was not performing at his employer's expectations. *Id.* at 1137-38. The court rejected that argument, emphasizing that at this stage the plaintiff's burden "is not a heavy [one] nor was it meant to be[,]" and as long as the plaintiff "adduces evidence that he has, in fact, performed the position up to the time of termination, the slight burden" of showing that he is qualified has been established. *Id.* at 1144.

employer has the burden of rebutting.[72]

The nature of "intent" under the U.K. concept of direct discrimination is slightly different. There, the objective result, rather than inferring the employer's subjective intent, is the focus.[73] If a woman is treated differently than a man for any reason (and vice versa), even for a benign reason, there is direct discrimination.[74]

Like the plaintiff's initial burden under Title VII, the prima facie burden of production is low for a plaintiff alleging direct discrimination under the SDA. As British courts have explained, "Where there has been established an act of discrimination, and where it has been established that one party to the act of discrimination is female and the other male, prima facie that raises a case which calls for an answer."[75] The 2001 Regulations modify the SDA and statutorily define the plaintiff's prima facie burden: "It is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the [employer has] committed an act" of unlawful discrimination.[76]

Although the prima facie burdens for sex discrimination claims in the U.S. and the U.K. are similar, British and American courts treat such claims quite differently after the plaintiff's prima facie burden has been met. The subsequent burdens of proof differ significantly. As discussed below, because of these differences, the U.S. system is considerably more employer-friendly than the plaintiff-friendly system that continues to evolve in the U.K. as highlighted by the 2001 Regulations.

2. The Title VII "Hot Potato": Shifting the Burden from Plaintiff to Defendant to Plaintiff.

Under a Title VII individual disparate treatment claim, once the plaintiff establishes a prima facie case, her work is not finished. The burden first shifts to the defendant to show a legitimate, non-discriminatory reason for the employment decision.[77] However, if the employer discharges that burden, the plaintiff is once again in the spotlight and to succeed must demonstrate that the employer's reason given for the discrimination was either pretextual or discriminatory in its

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72. *Burdine*, 450 U.S. at 254.

73. *See, e.g.*, Ministry of Defence v. Jeremiah, [1980] Q.B. 87. However, this distinction between U.S. and U.K. law may be largely theoretical, given that U.S. law permits wide inferences about intent based on the end result of how employees are treated. *See infra* note 65.

74. Ministry of Defence v. Jeremiah, [1980] Q.B. 87.

75. Wallace v. S. E. Educ. and Library Bd., [1980] I.R.L.R. 193.

76. S.I. 2001/2660 § 5.

77. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

application.[78]

a. The employer's burden of production

The employer's burden in a Title VII case is not as high as it is in Equal Pay Act cases. In *Texas Department of Community Affairs v. Burdine*,[79] a female accounting clerk sued under Title VII alleging sex discrimination when, as part of a reorganization, her employer failed to promote her and eventually terminated her, while male employees remained employed and in some cases were promoted.[80] After a bench trial, the district court accepted the employer's explanation that the plaintiff, along with two other employees, was terminated after a nondiscriminatory evaluation of their relative qualifications and because they did not work well together.[81]

Reversing in part, the Fifth Circuit held that the employer had not met its burden of successfully rebutting the plaintiff's prima facie case.[82] The Fifth Circuit affirmed its previously announced standard that not only must a defendant prove by objective evidence the existence of legitimate, non-discriminatory reasons for the employment action, but it also must prove that those hired or promoted were better qualified than the plaintiff.[83] The court found that here, the employer satisfied neither of those elements.[84]

However, the Supreme Court rejected the Fifth Circuit's standard. Instead, the Court held that when an employer is rebutting the plaintiff's prima facie case, it need not persuade the court that it was actually motivated by the non-discriminatory reasons it offered.[85] Rather, the employer's evidence need only raise a genuine issue of fact as to whether it discriminated against the plaintiff.[86] To satisfy this "intermediate" burden, the employer must clearly set forth the reasons for its action, and the explanation must be "legally sufficient to justify a judgment for the defendant."[87] However, the employer need not do more than produce admissible evidence that would allow the trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory animus.[88] In other words, the employer need not actually

78. *Id.* at 806.
79. 450 U.S. 248 (1981).
80. *Id.* at 250-51.
81. *Id.* at 251.
82. *Id.* at 252.
83. *Id.*
84. *Id.*
85. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981).
86. *Id.* at 254.
87. *Id.* at 255, 258.
88. *Id.* at 257.

persuade the factfinder that the employment action was unlawful.[89]

The Court stated that the Fifth Circuit's opinion in *Burdine* had "misconstrued" the defendant's burden and instead had improperly placed the burden of persuasion on the defendant.[90] The Court emphasized that the employer's burden is only one of production, while the ultimate burden of persuasion rests with the plaintiff.[91] The Court was concerned that the lower court's high burden on employers could be read as requiring an employer to hire a minority or female applicant whenever that person's objective qualifications are equal to those of a white male applicant.[92] However, the Court noted, Title VII in fact permits an employer the discretion to choose among equally qualified candidates provided the decision is not based on unlawful criteria.[93]

In addition to articulating a non-discriminatory reason for the employment decision, Title VII provides several statutory defenses for employers accused of sex discrimination.[94] The most relevant is the "bona fide occupational qualification" (BFOQ) defense, which allows an

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89. *Id.* The *Burdine* Court recognized that although as a defendant the employer is not *required* to persuade the trier of fact that the employment decision was ultimately lawful, it nevertheless retains an incentive to do so, and thus the employer will normally attempt to prove the factual basis for its explanation. *Id.* at 258. However, the employer need only offer enough of a rebuttal to cancel out the plaintiff's prima facie evidence. Since the plaintiff's initial burden of putting on a prima facie case is relatively low, the employer's burden is correspondingly low, and if the employer meets its burden, the presumption raised by the plaintiff "drops from the case. . . . A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Id.* at 255 n.10. *See also* Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 (1978) ("[T]he employer's burden is satisfied if [it] simply 'explains what [it] has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.").

90. *Burdine*, 450 U.S. at 256-57.

91. *Id.* at 254-55.

92. *Id.* at 259.

93. *Id.*

94. These include, for example, exemptions from Title VII for Communist Party members, national security exceptions, and exceptions for seniority or merit systems. 42 U.S.C. § 2000e-2(f)-(h) (2006). Earlier in Title VII's history, an employer had also been able to avoid a finding of liability under Title VII by invoking a "same decision" defense. That is, even if an illegal reason was a partial motivator behind the employment decision, if the employer could persuade the factfinder that it would have made the same decision for legitimate reasons absent the illegal reason (i.e., poor job performance), it did not violate Title VII. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). However, this outcome was eliminated with the 1991 amendments to Title VII. Now an employer cannot avoid liability with the same decision defense, but the defense may be relevant in limiting the plaintiff's remedy. 42 U.S.C. § 2000e-2(m) (2006) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for *any* employment practice, *even though* other factors also motivated the practice" (emphasis added)). The 1991 amendments also authorized the recovery of compensatory and punitive damages in addition to injunctive relief and back pay. 42 U.S.C. § 1981A (2006).

employer to discriminate on the basis of sex in those instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise.[95] In a broad interpretation of this defense, the Supreme Court has held that state regulations barring women from working as guards in a male prison do not violate Title VII under the BFOQ exception.[96] Generally, however, the BFOQ exception has been interpreted very narrowly in accordance with Equal Employment Opportunity Commission guidelines because labeling jobs as "men's" or "women's" jobs tends to deny employment opportunities necessarily to one sex or the other.[97]

b. The plaintiff's burden of persuasion

Once the employer has satisfied its relatively low burden of production rebutting the employee's prima facie case, the plaintiff retains the ultimate burden of persuasion to show that illegal discrimination motivated the employer's decision.[98] To prevail, the plaintiff must persuade the court that the employer's proffered reason for the employment decision was pretextual or discriminatory in its application.[99]

i. Pretext-Plus

Courts have wrestled with the nature of the plaintiff's burden of persuasion at this stage of litigation. In the 1990s, in *St. Mary's Honor Center v. Hicks*,[100] the Supreme Court hinted at a high bar for plaintiffs by rejecting the idea that a plaintiff should always win simply by showing the employer's proffered reason was pretextual. In this race discrimination case, an African-American correctional officer who had enjoyed a satisfactory employment record under a prior supervisor was terminated after conflicts with a new supervisor and subsequent

95. 42 U.S.C. § 2000e-2(e)(1) (2006).

96. Dothard v. Rawlinson, 433 U.S. 321 (1977). The *Dothard* Court felt that the BFOQ exception was justified because of the fact that sex offenders were scattered throughout the prison system, the inmates were deprived of a "normal heterosexual environment," and "the employee's very womanhood" would "undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336.

97. 29 C.F.R. § 1604.2(a) (2006).

98. *Burdine*, 450 U.S. at 253.

99. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). There, the Court emphasized how important this burden is to plaintiffs. When remanding the case back to the district court to give the plaintiff the chance to show employer pretext, the Court instructed that in the absence of a finding of pretext or discriminatory application, the employer's action "must stand." *Id.* at 806.

100. 509 U.S. 502 (1993).

degradation of his work history.[101] After a bench trial, the district court found that the reasons the employer gave for the demotion and discharge were not the "real" reasons.[102] Nevertheless, it also found that the employer had sustained its burden of production by introducing legitimate, non-discriminatory reasons for its actions, specifically, that the employee had violated numerous rules.[103] Because the employee did not adequately rebut those reasons, the trial court entered judgment in the employer's favor.[104]

The Eighth Circuit reversed, holding that once an employee proves all of the employer's proffered reasons for the employment action to be pretextual, the employee is entitled to judgment as a matter of law.[105] Because all of the employer's reasons were discredited, the court held that the employer had offered no legitimate reasons for its actions and was in no better a position than it would have been had it remained silent and not offered any rebuttal to the plaintiff's prima facie case, thus compelling judgment for the employee.[106]

The Supreme Court rejected the Eighth Circuit's holding that once an employee proves that all of the employer's proffered reasons for the employment action are pretextual, the employee is entitled to judgment as a matter of law.[107] Instead, the Court emphasized the high hurdle for the plaintiff by tying her burden at this stage to the Federal Rules of Evidence.[108] The plaintiff still bears the burden of persuading the trier of fact that the discriminatory action was because of sex.[109] To hold otherwise, the Court said, would go against the Court's "repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"[110] This ultimate burden requires a showing both that the employer's proffered reason was false, *and* that discrimination was the real motivator.[111] The standard a court must use in finding illegal discrimination is not that the employer's explanation of its action is not believable, but rather that the employer's action was the product of

101. *Id.* at 504.
102. *Id.* at 508.
103. *Id.* at 507.
104. *Id.*
105. *Id.* at 508-09.
106. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-09 (1993).
107. *Id.* at 509.
108. *Id.* at 507, *citing* Fed. R. Evid. 301 (2005) ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk or nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").
109. *St. Mary's Honor Center*, 509 U.S. at 507.
110. *Id.* at 511.
111. *Id.* at 515.

unlawful discrimination.[112]

ii. Pretext Only

*St. Mary's Honor Center* sharply divided the Court: the decision was five to four. The dissenters criticized the majority's holding, describing it as saying that once a plaintiff succeeds in showing an employer's proffered reasons are pretextual, the factfinder may still proceed to "roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."[113] The Court visited the issue again in 2000 in *Reeves v. Sanderson Plumbing Products, Inc.*,[114] after a split developed in the circuits post-*St. Mary's Honor Center* over the evidence a plaintiff must present, beyond a showing that the employer's proffered reasons were pretextual, to be successful.[115]

In *Sanderson Plumbing Products*, a jury found that the plaintiff was illegally terminated because his employer had willfully discriminated against him based on his age.[116] However, adopting the view of some other federal circuits based on their reading of *St. Mary's Honor Center*, the Fifth Circuit reversed.[117] Although the court acknowledged that the employee "very well may" have offered sufficient evidence for a reasonable jury to find the employer's explanation for its employment decision was pretextual, the court concluded that the plaintiff had not introduced sufficient additional evidence to satisfy his burden to convince a rational jury that he had been discharged because of his age.[118] The court therefore reversed the district court's judgment in favor of the employer.[119]

The Supreme Court reversed the Fifth Circuit, because it had "misconceived the evidentiary burden borne by plaintiffs" once an employer proffers its reason for the action it took.[120] The Court clarified that in *St. Mary's Honor Center*, it had reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity

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112. *Id.* at 514.
113. *Id.* at 525 (Souter, J., dissenting).
114. 530 U.S. 133 (2000). This case was an age discrimination case brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2006). The Court assumed that ADEA cases share the same *McDonnell Douglas* burden-shifting paradigm as do Title VII cases. *Id.* at 142.
115. *Sanderson Plumbing Prods.*, 530 U.S. at 140.
116. *Id.* at 139.
117. *Id.*
118. *Id.* at 139-40.
119. *Id.*
120. *Id.* at 146.

of the employer's explanation.[121] The Court noted that such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."[122] Although showing that an employer's proffered reasons are pretextual may not always be adequate to sustain a jury's ultimate finding of liability, the Court concluded, it is sufficient to permit the case to proceed to the factfinder.[123] The factfinder can then draw inferences where appropriate and make a decision based on all the evidence.[124] The *Sanderson Plumbing Products* standard remains the law today.

3. Post-Prima Facie Burdens under the Sex Discrimination Act.

Shifting the burden of production to the defendant in U.K. sex discrimination cases will be recognizable to those familiar with the U.S. system. Once the plaintiff has established her prima facie case, British employers, like their American counterparts, have the burden of showing their actions were not due to the sex of the employee. However, as highlighted by the 2001 Regulations, a British employer's burden is a very high one indeed, and as will be explored, a plaintiff's post-prima facie burden is now almost nonexistent. This stands in sharp contrast to the U.S. where, despite the Supreme Court's apparent easing of the *St. Mary's Honor Center* rule with *Sanderson Plumbing Products*, the burden explicitly shifts back to the plaintiff after the employer gives its explanation.

a. Employer's burden prior to the 2001 Regulations

As early as 1981, shifting the burden from the plaintiff to the employer in discrimination cases began to develop in British case law. Initially, the burden on the employer was fairly high. In *Khanna v. Ministry of Defence*,[125] the employment appeal tribunal (EAT) held that the efficient way to deal with discrimination cases would be for the tribunal to look at the evidence as a whole and "simply decide[] whether the complaint has been established."[126] If a prima facie case was established and less favorable treatment proven, the employer would be called upon to explain.[127] Failing a "clear and specific" explanation, the

121. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 at 147 (2000).
122. *Id.*
123. *Id.* at 148.
124. *Id.*
125. [1981] I.C.R. 653.
126. *Id.*
127. *Id.*

tribunal would infer unlawful discrimination and the complaint would succeed.[128]

However, courts later eased the burden on the employer. The court of appeal in *King v. The Great Britain-China Centre*[129] exemplified the change. In *Great Britain-China Centre*, a race discrimination case, a Chinese woman educated in Britain applied for a job at the Centre, a government sponsored organization created to promote cultural and social ties between the people of Great Britain and China.[130] The job description included the requirements that applicants have "[f]irst-hand" knowledge of China and be fluent in Chinese, which the plaintiff met.[131] However, the Chinese plaintiff was not offered an interview while all the candidates who were offered an interview, including the ultimately successful candidate, were white.[132]

The industrial tribunal upheld the complaint.[133] It noted that no ethnically Chinese person had ever been employed at the Centre, nor had any of the five Chinese candidates for this position made it to a short list to be considered for the job.[134] Therefore, the tribunal concluded, because the employer did not demonstrate that the plaintiff had not been treated unfavorably, or that the unfavorable treatment was not because of her race, it was entitled to draw the conclusion that the plaintiff had been discriminated against because of her race.[135] The case proceeded to an appeal, where the employer argued that the lower tribunal had placed too high a burden on it to disprove the discrimination.[136]

While the court of appeal agreed with the industrial tribunal in this case, it clarified that the evidentiary burden of proof to prove discrimination should not be fully shifted to the employer as a matter of law.[137] In fact, the court called such an attempt "unnecessary and unhelpful."[138] The court was clear that a plaintiff is still required to make out a prima facie case using a balance of the probabilities standard.[139] However, once the plaintiff establishes a prima facie case showing possible illegal discrimination, the tribunal is then entitled to look to the

128. *Id.* This plaintiff-friendly view was adopted by the court of appeal in *Baker v. Cornwall County Council*, [1990] I.R.L.R. 194.
129. [1992] I.C.R. 516.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. King v. The Great Britain-China Centre, [1992] I.C.R. 516.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

employer for an explanation.[140] If no explanation is given, or if the tribunal considers the explanation to be inadequate or unsatisfactory, "it will be legitimate for the tribunal to infer" illegal discrimination, "not [as] a matter of law, but . . . almost common sense."[141]

In addition to successfully rebutting the plaintiff's prima facie case, British employers have a statutory defense available to them under the SDA called the "genuine occupational qualification" exception.[142] The defense is similar to the bona fide occupational qualification defense available to American employers, and applies "where being a man is a genuine occupational qualification for the job."[143] This can occur where "the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina)" or where "the job needs to be held by a man to preserve decency or privacy" because it might involve physical contact or a state of undress or "using sanitary facilities."[144] An employer successfully asserting this defense can escape liability.

b. The 2001 Burden of Proof Regulations

The 2001 Regulations added a new section to the SDA that instructs employment tribunals on how to handle sex discrimination complaints. The codified law now requires that once a plaintiff has made out a prima facie case of sex discrimination, "in the absence of an adequate explanation from the [employer], . . . the tribunal *shall* uphold the complaint unless the [employer] proves that he did not commit, or . . . is not to be treated as having committed, that act."[145]

The new Regulations appear to relieve the plaintiff of the ultimate burden of persuasion and to embody much of the *Khanna* standard, giving plaintiffs more ammunition than they had after *Great Britain-China Centre*. This was evident in the first major case addressing the changes, *Barton v. Investec Henderson Crosthwaite Securities Ltd.*[146] *Barton* involved a female investment banker and fund manager who received a smaller bonus and fewer share options than did a male counterpart.[147] The tribunal accepted the employer's explanation for its decision to reward the male employee more, and excused any unfair

140. *Id.*

141. King v. The Great Britain-China Centre, [1992] I.C.R. 516. The House of Lords ultimately adopted the *Great Britain-China Centre* view in Glasgow City Council v. Zafar, [1997] W.L.R. 1659.

142. SDA § 7.

143. *Id.*

144. *Id.*

145. 2001 Regulations § 5, creating SDA § 63A (emphasis added).

146. [2003] I.C.R. 1205.

147. *Id.* at ¶¶ 5-7.

results of the bonus as being an innocent byproduct of the financial industry employment culture.[148] The tribunal also found that the employer had made out a successful defense because of its concern about the male employee being head-hunted by other firms, and because the employer felt that the male employee was important to the company's success.[149] Barton appealed, citing the misapplication of the new 2001 Regulations as one source of error.[150]

On appeal, the employment appeal tribunal set out new guidance in light of the 2001 Regulations. The EAT made clear that what has not changed in direct discrimination cases is the requirement that the plaintiff make out a prima facie case that satisfies the balance of probabilities standard or the complaint will fail.[151] However, if that standard is satisfied, and if the plaintiff has shown facts from which inferences "could" be drawn,[152] the burden shifts to the defendant who then must prove that it either did not commit, or is not to be treated as having committed, that act.[153] To discharge that burden, the employer must prove by a balance of the probabilities standard that the treatment was not at all based on sex, since "no discrimination whatsoever" is what is required by the European law upon which the 2001 Regulations are based.[154]

Further, the EAT elaborated that the discharge of the employer's burden is a burden of persuasion rather than merely a burden of

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148. *Id.* at ¶ 8. It was undisputed that the bonus scheme was a murky one. The tribunal found that the scheme was "a rough and ready exercise, not a precise science," and that it was both a "cultural reason" and a "vital component of the City bonus culture that bonuses [were] discretionary, [with] scheme rules . . . unwritten and individuals' bonuses . . . not revealed." *Id.* Were it not set up that way, the bonus system would "collapse." *Id.* The tribunal therefore accepted the employer's unwillingness to disclose bonuses until compelled by law to do so as part of that culture, and did not draw any negative inferences from that behavior. *Id.* at ¶ 10.

149. *Id.* at ¶ 9.

150. *Id.* at ¶ 11.

151. *Id.* at ¶ 25(1)-(2).

152. Barton v. Investec Henderson Crosthwaite Ltd., [2003] I.C.R. 1205 at ¶ 25(8). The EAT emphasized the word "could" in the 2001 Regulations which requires that the plaintiff must "prove facts from which the tribunal could . . . conclude [unlawful discrimination] in the absence of an adequate explanation." 2001 Regulations § 5, adding § 63A(2) to the SDA. The EAT elaborated:

> It is important to note the word could. At [the prima facie] stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts provided by the [employee] to see what inferences of secondary fact could be drawn from them.

*Barton*, [2003] I.C.R. 1205 at ¶ 25(5).

153. *Barton*, [2003] I.C.R. 1205 at ¶ 25(8)-(9).

154. *Id.* at ¶ 25(10). Here the EAT is referring to language in the European Council Burden of Proof Directive, E.C. Directive 97/80 (1997), which the EAT quotes directly.

production:

> [A] Tribunal [must] assess not merely whether the [employer] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question. . . . Since the facts necessary to prove an explanation would normally be in the possession of the [employer], a Tribunal would normally expect cogent evidence to discharge that burden of proof.[155]

The EAT remitted the case to a fresh tribunal to reconsider the matter in light of the EAT's guidelines with regard to the 2001 Regulations.[156]

Employment tribunals are still adjusting to the 2001 Regulations and the guidance set forth in *Barton*. For example, in *Cunningham v. Quedos Ltd.*,[157] an employment tribunal failed to shift the burden to the employer as required under the new law. In *Cunningham*, a woman applied for the position of a pharmaceutical sales representative at Wyeth, a pharmaceutical company.[158] Cunningham had been employed in the same capacity with employer Quedos, an independent contractor for Wyeth, and had been working on the Wyeth contract when Wyeth decided to bring the work in-house.[159] People at both Quedos and Wyeth were familiar with Cunningham's work.[160] Quedos recommended her to Wyeth as a good addition to their newly-forming in-house sales team, and she was led to believe she was very competitive for the new position.[161] Six days after she was informed she would be interviewed for the position with Wyeth, she told people at both Quedos and Wyeth that she was pregnant.[162] Two weeks later, without explanation she was told her application with Wyeth would be taken no further and she would not be interviewed for the position.[163] After she questioned the reasons behind the decision, she was terminated by Quedos.[164] Wyeth, apparently fearing legal action, ultimately went through with an interview, but did not hire her.[165] Cunningham filed a complaint against

155. *Barton*, [2003] I.C.R. 1205 at ¶ 25(11)-(12).

156. *Id.* at ¶ 33. The EAT observed that in this case there appeared to be an "abundance" of evidence from which the lower tribunal should have drawn inferences of discrimination and shifted the burden to the employer. *Id.* at ¶ 32.

157. E.A.T./0298/03 (U.K. 2003).

158. *Id.* at ¶ 14.

159. *Id.* at ¶¶ 11-13.

160. *Id.*

161. *Id.*

162. *Id.* at ¶ 15.

163. *Id.*

164. Cunningham v. Quedos, E.A.T./0298/03 at ¶¶ 16-17 (U.K. 2003).

165. *Id.*

both Quedos and Wyeth.[166]

Despite a clear prima facie case, the tribunal accepted the employer's explanation that there was no bias involved in the decision, and that the reason Cunningham was not hired was because other candidates were better qualified.[167] The tribunal said:

> She was not selected solely because, on the [interview] day, her performance . . . did not sufficiently impress her interviewers. It had nothing to do with her pregnancy. The question of drawing an inference, of sex discrimination or otherwise, does not therefore arise. The [employer] did not treat the Applicant less favourably by reason of her sex, and her claim for sex discrimination against them therefore fails.[168]

Cunningham appealed. She argued that since she had established a prima facie case, the tribunal should have made the inference of sex discrimination and the burden of persuasion should have shifted to Wyeth to prove that it did not act discriminatorily.[169] Therefore, she argued, the tribunal failed to hold Wyeth to the higher standard of persuasion now required by the 2001 Regulations and *Barton*.[170]

The employment appeal tribunal agreed. Because the tribunal heard Cunningham's case on January 20, 2003,[171] but the *Barton* decision was not issued until March 6, 2003, the EAT realized that "[t]here is no indication that [the tribunal] clearly understood, as Tribunals now with the benefit of Barton will understand, how the mechanics of the new burden will be worked through."[172] Extensively citing *Barton*, the EAT concluded that Cunningham had in fact made out a prima facie case, and therefore the tribunal should require the employer to prove that discrimination was not the reason for Cunningham's treatment.[173] The case was remanded to a new tribunal with instructions to apply the *Barton* guidelines.[174]

### B. *Disparate Impact and Indirect Discrimination*

Even if is undisputed that the employer was not actually motivated by illegal discrimination, did not intend to discriminate, and did not treat an individual woman less favorably than a man, an employer can still run

166. *Id.* at ¶ 17.
167. *Id.* at ¶ 12(4).
168. *Id.* at ¶ 19(22) (emphasis added).
169. *Id.* at ¶¶ 29-31.
170. Cunningham v. Quedos, E.A.T./0298/03 at ¶¶ 21, 29-31 (U.K. 2003).
171. *Id.* at ¶ 2.
172. *Id.* at ¶ 44.
173. *Id.* at ¶ 48.
174. *Id.* at ¶¶ 49-51.

afoul of both American and British law if its practices have a negative impact on one group more than another. This concept originated in the U.S. courts where it is known as disparate impact.[175] A similar concept has evolved in the U.K. where it is known as indirect discrimination.

1. Development in the U.S.

The Supreme Court articulated the concept of disparate impact early in Title VII's history in the landmark case *Griggs v. Duke Power Co.*[176] In *Griggs*, a power generating facility implemented a policy of requiring a high school diploma or successful completion of a standardized written test before employees would be permitted to work in certain positions within the facility.[177] At that time in North Carolina, where the facility was located, 34% of white males had completed high school but only 12% of black males had done so.[178] In addition, the Equal Employment Opportunity Commission had found that use of standardized tests including those used here resulted in 58% of whites passing the tests, compared to only 6% of blacks.[179] There was no dispute that neither the diploma nor the test requirements were intended to measure the ability to learn to perform any specific jobs,[180] or had any demonstrable relationship to the actual successful performance of the jobs for which they were prerequisites.[181]

The district court found that although the employer previously had followed a policy of overt racial discrimination, Title VII was not violated because it no longer did so.[182] The court of appeals agreed, holding that a subjective test of the employer's intent should govern and that because no discriminatory purpose behind the diploma and test requirements had been shown, there was no violation of Title VII.[183]

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175. "Disparate impact" is defined as the adverse effect of a facially neutral practice that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability that is not justified by business necessity. BLACK'S LAW DICTIONARY 483 (7th ed. 1999). This is different from systemic disparate treatment, which consists of employment practices which discriminate against groups of people but still requires intent or motive on the part of the employer to discriminate. *See, e.g.*, Teamsters v. United States, 431 U.S. 324 (1977).

176. 401 U.S. 424 (1971).

177. *Id.* at 427-28.

178. *Id.* at 430 n.6.

179. *Id.*

180. *Id.* at 428.

181. *Id.* at 431. A vice president of the company testified that the tests were implemented based on the employer's judgment that the new requirements "generally would improve the overall quality of the work force." *Id.*

182. Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971).

183. *Id.* However, the court of appeals rejected the district court's finding that Title VII was intended to be prospective only and consequently the impact of prior inequities

Because there was no showing of "racial purpose or invidious intent," and because the requirements were applied to whites and blacks alike, the court of appeals held that the requirements should be permitted.[184] The court specifically rejected the claim that because the requirements resulted in a "markedly disproportionate" number of blacks being ineligible for the positions, they were unlawful under Title VII unless shown to be job related.[185]

The Supreme Court granted certiorari because whites fared far better under the employer's requirements than blacks for reasons that could be traced directly to race.[186] The Court reasoned that because Congress attempted to eliminate race-based preferences by enacting Title VII, the legislation mandates the removal of "artificial, arbitrary, and unnecessary barriers" when such barriers have the effect of discriminating on the basis of race or other impermissible classifications.[187] The Court specifically held that "good intent or absence of discriminatory intent" does not redeem such employment procedures, and that Congress "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[188] Therefore, the employer has the burden of showing that any requirement which ends up having a disparate impact on one group has a "manifest relationship" to the employment in question and is borne of a "business necessity."[189] Otherwise, the practice is prohibited.[190] Although the employer in *Griggs* pointed to language in Title VII specifically permitting the use of general intelligence tests,[191] the Court found that the employer did not meet its burden of showing that the test was "predictive of or significantly correlated with important elements of work behavior" for the jobs for which the tests were required.[192]

In 1991, amendments were made to Title VII which essentially codified the *Griggs* standards and the disparate impact concept.[193] The

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was beyond the reach of the act. *Id.* at 429.

184. *Id.* at 429.

185. *Id.*

186. *Id.* at 430. The Court recognized that the results were different by race because African Americans had "long received inferior education in segregated schools." *Id.*

187. *Id.* at 431.

188. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis added).

189. *Id.* at 431.

190. *Id.*

191. "[It shall not be] an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (2006).

192. *Griggs*, 401 U.S. at 433 n.9, quoting EEOC guidelines.

193. The 1991 amendments read:

> An unlawful employment practice based on disparate impact is established . . .

1991 amendments also permit plaintiffs to prevail even if an employer can show a business necessity for the practice if the plaintiff can show an "alternative employment practice."[194] To show an alternative employment practice, the plaintiff must demonstrate that an acceptable and less discriminatory alternative exists, and that the employer refused to adopt it.[195]

2. Development in the U.K.

The *Griggs* disparate impact analysis soon crossed the Atlantic.[196] The concept was codified in the SDA, which stipulates that such "indirect discrimination" occurs when an employer applies a "requirement or condition" to a woman that is also applied to a man, but which is such that "the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it."[197] If the employer cannot show that the requirement or condition is "justifiable," and if it "is to [the employee's] detriment because she cannot comply with it[,]" the SDA has been violated.[198]

Under the SDA, the impact of an employer's specific "requirement or condition" is scrutinized, rather than the more general "employment practice" or procedures of an employer in the U.S.[199] A plaintiff in the U.K. need only show that she cannot actually comply with the

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> if a complaining party demonstrates that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). The 1991 amendments also explicitly state that the business necessity defense may not be used against a claim of intentional discrimination (i.e., disparate treatment). 42 U.S.C. § 2000e-2(k)(2) (2006). Recently the Supreme Court clarified that plaintiffs can also bring disparate impact claims based on age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2005). Smith v. City of Jackson, Mississippi, 125 S. Ct. 1536 (2005).

194. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2005).

195. *Id.*

196. British courts and parties became familiar with U.S. case law on the issue. *See, e.g.*, Jenkins v. Kingsgate, [1981] W.L.R. 927 (discussing a plaintiff in the U.K. referring to the disparate impact "principle enunciated by the Supreme Court of the United States in Griggs v. Duke Power Co." and noting that the principle of "adverse impact" as noted by *Griggs* is the same as in § 1(1)(b) of the SDA).

197. SDA § 1(1)(b). The language is nearly identical in the Race Relations Act, § 1(1)(b), except the Race Relations Act refers to "racial groups" instead of "women."

198. *Id.*

199. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). However, even in the U.S., a plaintiff must be able to point to discrete "particular" employment practices instead of simply the end result of a disparity in the numbers of employees from a particular group being impacted, unless the particular practices cannot be separated. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

requirement or condition; the existence of another woman who may be able to comply is immaterial. For example, in *Price v. Civil Service Commission*,[200] a female clerk applied for a position as an executive officer.[201] The position required that applicants be between the ages of seventeen-and-a-half and twenty-eight, a requirement with which the applicant could not comply.[202] She filed suit under the SDA, alleging indirect sex discrimination on the grounds that women have greater difficulty complying with such a requirement than men because many more women than men in that age group have child care responsibilities.[203] Therefore, women would be less likely to apply for a position with that requirement because by the time they no longer had child care responsibilities, they would be too old.[204]

The employment tribunal dismissed the case, narrowly construing the "can comply" wording of the Act when it held that it is possible for women to comply with the requirement if they do not have children.[205] The EAT rejected this reasoning, holding that just because a woman "can" theoretically comply with the Act, such a construction would be "wholly out of sympathy with the spirit and intent" of the Act.[206] Instead, the EAT held that whether a person can comply should be evaluated in terms of whether a specific plaintiff can actually do so.[207]

According to the Act, the employer's burden is to show that the requirement or condition is "justifiable irrespective of the sex of the person to whom it is applied."[208] An early articulation of the employer's burden was made in *Steel v. Union of Post Office Workers*.[209] In that case, a female postal worker alleged sex discrimination because of a seniority system that prevented her from receiving a promotion, but allowed a male employee who had been employed for less time to be promoted.[210] The EAT overturned the industrial tribunal's dismissal of

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200. [1977] W.L.R. 1417.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* The employer submitted evidence that more women than men had applied to and been hired in such positions, offering that as proof that the requirements did not unduly burden women. *Id.*

206. Price v. Civil Serv. Comm'n, [1977] W.L.R. 1417.

207. *Id.* The case was ultimately remanded to a differently constituted tribunal for further proceedings. *Id.*

208. SDA § (1)(b)(ii).

209. [1978] W.L.R. 64.

210. *Id.* Prior to the SDA being implemented in 1975, only men could be "permanent" employees with this employer, while women were limited to being "temporary" employees. *Id.* After the implementation of the SDA, women could attain permanent status, but their seniority in that status was measured from the time they attained that status. *Id.* No credit was given for previous time worked for the employer

the case on a technicality,[211] and remanded it for further proceedings with instructions that the plaintiff should succeed unless the employer could satisfy its "heavy onus [of proof]."[212] In deciding whether the employer had discharged its burden, the EAT directed the tribunal to:

> [T]ake into account all the circumstances, including the discriminatory effect of the requirement or condition if it is permitted to continue. . . . [Also,] it is necessary to weigh the need for the requirement or condition against that effect. [Finally,] it is right to distinguish between a requirement or condition which is necessary, and one which is merely convenient, and for this purpose it is relevant to consider whether the employer can find some other and non-discriminatory method of achieving his object.[213]

The employer's burden was eased somewhat in *Ojutiku and Oburoni v. Manpower Services Commission*,[214] where the court of appeal specifically criticized the *Steel* court for suggesting "justifiable" rose almost to the level of "necessity."[215] In rejecting what was essentially the business necessity standard articulated in *Steel*, Lord Justice Everleigh found that "justifiable" does not mean the employer has to show that the requirement or condition is necessary for the good of the business.[216] Rather, an employer has justified its conduct merely by

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as a temporary employee. *Id.* The plaintiff had actually been employed by the post office since 1961. *Id.* She had applied for a different mail delivery route in 1976, but routes were awarded by seniority based on permanent status. *Id.* The route was therefore awarded to a man who had only been employed by the post office since 1973, but who had been on permanent status that entire time, and so was technically more senior under the rules. *Id.*

In this regard the case is similar to Corning Glass Works v. Brennan, 417 U.S. 188 (1974), *see infra* note 33, which the EAT in *Steel* notes at n.2. Both involved systems of separate work classifications for women and men that originated before such classifications became illegal, and both involved union-negotiated collective bargaining agreements that had the practical effect of perpetuating the effects of past discrimination even after the different classifications were abolished.

211. The employee's complaint was actually directed not at her employer but at her union, whom she faulted for negotiating seniority provisions that did not credit women who were employees before receiving permanent status in 1975 with any time worked before then. *Steel*, [1978] W.L.R. 64. Nevertheless, the EAT found the employer liable for violating the SDA. *Id.*

212. *Id.*

213. *Id.* The very last bit echoes the "alternative employment practice" concept in Title VII discussed *infra* note 193.

214. [1982] I.C.R. 661. *Ojutiku* was a race discrimination case but the relevant language concerning the employer's "justification" for the requirement or condition found in the Race Relations Act is identical to that in the SDA: the employer must show the requirement or condition "to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to which it is applied." Race Relations Act § 1(1)(b)(ii).

215. *Ojutiku*, [1982] I.C.R. 661.

216. *Id.*

showing that the conduct "would be acceptable to right-thinking people as sound and tolerable reasons for so doing."[217]

3. The 2001 and 2005 Regulations on Indirect Discrimination.

The 2001 Regulations do not change the "justifiable" language modifying the employer's burden in indirect discrimination claims. Rather, they make three changes that ease the plaintiff's burden. First, an employer now has to be concerned about any broad "provision, criterion, or practice" it may have instead of a specific "requirement or condition."[218] Second, rather than a specific woman not being able to comply with the "provision, criterion, or practice," it only has to be "to the detriment of a considerably larger proportion of women than of men."[219] Finally, instead of the "provision, criterion, or practice" having to be "to her detriment because she cannot comply with it," it merely has to be "to her detriment."[220]

Although the new definition of indirect discrimination does not explicitly change the employer's obligation to justify a discriminatory employment practice, it would seem to make the plaintiff's job easier. Some commentators have observed that the new definition not only refers to a wider "provision, criterion, or practice" instead of a requirement or condition to which a plaintiff can object, but also that the plaintiff no longer has to prove that she cannot comply with such a practice—it is now enough that she show complying would be to her vague "detriment."[221] In addition, the change from the showing that a "considerably smaller . . . proportion" of women than men can comply to the showing that the practice must be "to the detriment of a larger proportion of women than men" may lead to controversy over how statistics are gathered and presented in sex discrimination cases.[222] Finally, combined with other changes to the SDA that require an employment tribunal to "uphold the complaint unless the [employer] proves that he did not commit" unlawful sex discrimination, discussed previously, the burden has shifted more firmly from being primarily on the plaintiff to prove workplace discrimination to being primarily on the employer to prove that it did not discriminate.[223]

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217. *Id.*

218. S.I. 2001/2660 § 3, modifying original SDA § 1(1)(b) and creating new SDA § 1(2)(b).

219. *Id.*

220. *Id.*

221. Paul Epstein, *Changes in the law of sex discrimination*, NEW LAW JOURNAL, Dec. 21, 2001.

222. *Id.*

223. *See* Patrick Tracey, *U.K. Rules on Preventing Sex Discrimination Shift Burden*

Further, although the 2001 Regulations are technically amendments to the SDA, courts are applying the principles to the Equal Pay Act as well. For example, in *Nelson v. Carillion Services Ltd.*,[224] a female employee of a company that performed service work in a hospital alleged unlawful sex discrimination under the Equal Pay Act because she was paid less than a man doing the same work.[225] The employment tribunal dismissed her claim, and the EAT affirmed.[226] She then appealed on the grounds that the tribunals erred by putting the burden of proof on her to establish her case of indirect discrimination, arguing that once she credibly raised such a case, the burden was then for the employer to disprove it.[227]

After a discussion about burdens of proof under the Equal Pay Act, the court moved into a discussion of the 2001 Regulations.[228] Even though this claim was initially brought under the Equal Pay Act, the court felt that there was "every reason" for approaching the burden of proof in indirect discrimination cases the same way irrespective of which legislative scheme the claim was brought under.[229] This case shows that British courts are not afraid to interpret the 2001 Regulations broadly.

On October 1, 2005, the definition of indirect discrimination under the SDA was again changed.[230] This latest revision was designed to bring U.K. law into full compliance with the 2002 Equal Treatment Directive issued by European Union legislation.[231] The primary change

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*from Employee to Employer*, 198 DAILY LABOR REPORT A-8, Oct. 16, 2001.

224. [2003] I.C.R. 1256.

225. *Id.* at ¶¶ 4-7.

226. *Id.* at ¶ 1.

227. *Id.* at ¶ 18. The court of appeal noted that this argument was not advanced before the EAT; nevertheless, the court went on to entertain it. *Id.*

228. *Id.* at ¶¶ 21-31.

229. *Id.* at ¶ 32, *citing* Strathclyde Reg'l Council v. Wallace, [1998] I.C.R. 205, 212. Unfortunately for Ms. Wallace, the court of appeal ultimately decided against her, finding that she "plainly failed" to even establish a prima facie case, so the question of whether the employer discharged its burden under the 2001 Regulations was not reached. *Nelson*, [2003] I.C.R. 1256 at ¶ 39. Despite the court's willingness to entertain the idea that the 2001 Regulations concerning employer burdens of proof could apply to Equal Pay Act claims, it was not willing to entertain the idea that the plaintiff's burden of establishing a prima facie case should be lowered. The plaintiff submitted the idea that the burden throughout an Equal Pay Act claim should be on the employer, with the employee only having to advance no more than a "credible suggestion," *id.* at ¶ 28, or a "positive averment," *id.* at ¶ 32, of disproportionate adverse impact. The court rejected both of those proposed standards. *Id.* at ¶ 30.

230. The Employment Equality (Sex Discrimination) Regulations 2005, S.I. 2005/2467. These Regulations also provide a statutory definition of harassment for SDA purposes.

231. U.K. GOV'T DEP'T OF TRADE AND INDUSTRY'S WOMEN AND EQUALITY UNIT, UPDATING THE SEX DISCRIMINATION ACT: CONSULTATION DOCUMENT 1-4 (2005), *available at* http://www.womenandequalityunit.gov.uk/publications/consultation.pdf (last visited Jan. 15, 2006).

to the definition of indirect discrimination is that instead of a provision, criterion or practice having to be "to the detriment of a considerably larger portion of women than of men," it must "put[] or would put women at a *particular disadvantage* when compared to men."[232] However, because U.K. sex discrimination legislation already meets most of the E.U.'s requirements, the government expects the practical changes arising from the 2005 Regulations to be minimal for private employers.[233]

## V. Conclusion

The historic common law and statutory roots of sex and employment discrimination legal principles are similar in the U.S. and the U.K. However, recently the two countries' standards on how employers can defend themselves from such claims have diverged. An employee alleging sex discrimination in the workplace who has met her prima facie burden has a considerably easier case in the U.K. than she would in the U.S. Even before the 2001 Regulations, a British employer had a fairly high burden to show the court that sex did not influence the employment decision. Although the full impact of the 2001 and 2005 Regulations concerning indirect discrimination have yet to be fully realized, the portion of the Regulations concerning burdens of proof appear to no longer require a plaintiff to actually prove that discrimination occurred. In the U.S., on the other hand, the employer only has a relatively low burden of production that the employee then has to counter clearly.

Reducing discrimination in the workplace is a noble goal. However, it may be unwise to disturb certain bedrock principles of law. One of those is *affirmanti, non neganti, incumbit probation* (the proof is incumbent on the one who affirms, not on the one who denies).[234] U.S. employers and those who represent them may feel that given the right (or wrong, depending on perspective) judge or jury, defendants bear a heavier burden than the actual law requires, but at least the theory of the law is on their side. Easing the plaintiff's ultimate burden and placing a burden of persuasion on the defendant in the manner mandated by the 2001 Regulations in the U.K. may encourage meritless litigation and put employers in the difficult and untenable position of having to prove a negative.

232. S.I. 2005/2467 at ¶ 3 (emphasis added).

233. *Supra* note 231. However, there are more significant changes for public and religious employers. *Supra* note 231 at 29-34.

234. BLACK'S LAW DICTIONARY 1618 (7th ed. 1999).